APPEAL NO. 93345

On March 29, 1993, a contested case hearing was held in (city), Texas, with (hearing officer) presiding. The hearing was held pursuant to the provisions of the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. art. 8303-1.01 *et seq.* (Vernon Supp. 1993) (1989 Act). The sole issue at the hearing was whether or not the respondent (carrier herein) was entitled to subrogation to the rights of the appellant (claimant herein) to certain benefits payable to the claimant by a liable third party. The hearing officer held that the carrier was entitled to subrogation and thus ordered that any workers' compensation benefits paid or owing by carrier to the claimant be offset by the amount collected from the third party. The claimant appeals, pro se, arguing that the carrier had relinquished its subrogation rights. The carrier responds that the claimant's appeal is untimely, and that the determinations of the hearing officer should be upheld with the exception of one finding of fact which the carrier contests.

DECISION

Finding the claimant's appeal timely and the carrier's appeal of the hearing officer's finding of fact untimely, and after reviewing the evidence, we reverse the decision of the hearing officer and render a new decision.

The first question to determine is the timeliness of appeal. The decision of the hearing officer, signed April 6, 1993, was distributed under a cover letter dated April 9, 1993. The records of the Texas Workers' Compensation Commission (Commission) show that this decision was mailed to the parties on April 12, 1993. Neither party indicates the date that it actually received the decision. Tex. W.C. Comm'n 28 TEX. ADMIN. CODE § 102.5(h) (Rule 102.5(h)), provides in part that "the commission shall deem the received date to be five days after the date mailed." This means that we deem that the claimant received the decision on April 17, 1993.

Rule 143.3(c) provides the following:

(c)A request made under this section shall be presumed to be timely filed or timely served if it is:

(1)mailed on or before the 15th day after the date of receipt of the hearing officer's decision, as provided in subsection (a) of this section; and

(2)received by the commission or other party not later than the 20th day after the date of receipt of the hearing officer's decision.

In the present case, the appellant's request for review was dated and postmarked on April 30, 1993, and received by the Commission on May 4, 1993. Pursuant to Rule 143.3(c) the claimant's appeal is timely, since it was mailed within 15 days and received by the Commission within 20 days of the date the decision was deemed to have been received by

the claimant.

The carrier in its response to claimant's request for review attacks one of the finding of the facts of the hearing officer. Since a cross-point of error is treated the same as an appeal, and since this response was mailed under a cover letter dated May 11, 1993, and postmarked May 12, 1993, which is 30 days after the after the hearing officer's decision was distributed to the parties, the appeal of this issue is untimely, and we lack jurisdiction to even consider it. *See* Article 8308-6.41(a); Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 143.3(a)(3); Texas Workers' Compensation Appeal No. 92141, decided May 21, 1992. While untimely as an appeal, the carrier's response is timely as a response to claimant's request for review pursuant to Article 8308-6.41(a), and will be considered for this purpose.

On (date of injury), the claimant was working for (employer), as a milk truck driver when his delivery truck was rear-ended by a pickup truck causing the claimant's truck to flip over and land in a bar ditch. The driver of the pickup truck (third party) was insured by the State Farm Insurance Company (third party carrier) with a $20,000 policy limit. The claimant testified that in December 1992 he spoke to (Ms. T) with the carrier's recovery department concerning subrogation. According to his testimony his discussions with Ms. T concerned whether the carrier would compromise its subrogation claim considering the severity of the his injuries. The claimant testified that Ms. T said she would get together with the employer and discuss compromising the carrier's subrogation claim.

The claimant testified that he had spoken to his own auto carrier and it had conducted an investigation which showed the third party had no other assets he could expect to collect from other than her third party carrier policy. Claimant testified that the reason his auto carrier had investigated was because the carrier refused to investigate the third party.

On January 5, 1993, the claimant spoke with (Mr. W), the third party carrier adjuster concerning his third party claim. Mr. W informed the claimant that he had a waiver signed by carrier waiving its subrogation interest in the third party claim. After this representation by Mr. W., the claimant on January 5, 1993, both executed a release settling his claim with the third party and received a settlement check made payable to him solely.

On January 7, 1993, the claimant had a telephone conversation with Ms. T. Ms. T said that she had spoken to the employer and that she would could make an offer concerning the subrogation claim. She offered that the carrier and claimant would take $10,000 apiece from the proceeds of a settlement with the third party carrier, but that the $10,000 received by the claimant would reduce the claimant's future benefits by $10,000 (apparently as an advance on future benefits). The claimant testified that this would not help him at all as far as he could see. When the claimant stated that the carrier had already waived its subrogation interest and that he had already settled his claim with the third party carrier, Ms. T refused to discuss the matter further telling the claimant to endorse the

settlement check and send it to the carrier or his workers' compensation benefits would be cut off.

The claimant said he then called third party carrier and asked for a copy of the letter in which the carrier had waived its subrogation interest. The letter is a letter from Mr. W to (Ms. S) of the carrier's recovery department. At the bottom of the letter by the word "ACKNOWLEDGED" appears the signature of Ms. S signing as the recovery specialist for the carrier and dated January 5, 1993. The body of the letter states:

> This letter is to confirm our conversation of this date regarding the above referenced claim. It is understood that [carrier] made no workers (sic) compensation payments in behalf of [claimant]; and further, they will have no subrogation claim.

After receiving the letter the claimant testified he called the carrier to discuss it and was told that the letter dealt strictly with property damage and had nothing to do with him. The claimant stated he then called the Commission and requested an expedited contested case hearing.

The carrier presented evidence that prior to January 5, 1993, that the carrier had presented a notice of subrogation lien to the third party carrier. There was also evidence that the carrier had provided the third party carrier with documentation of payments it had made in the claimant's workers' compensation claim.

Ms. T was called as a witness by the carrier. She testified that there were three adjusters in her office handling over 1,000 files. She testified that Ms. S is one of the three adjusters, and is "an auto recovery specialist" who does not handle workers' compensation claims. She states that the file number referenced on the letter from Mr. W to Ms. S is the file number for the auto damage portion of claimant's accident and not for the workers' compensation claim. She testified that if Ms. S used this number to pull a file up on her computer that it would only pull up information concerning the property damage aspects of the accident and not anything about claimant's workers' compensation claim.

Ms. T testified the letter speaks only to the specific file number, but she could not explain under cross-examination why the letter itself specifically mentions workers' compensation benefits. She does state that she would read a letter before she signed it.

Under Article 8308-4.05 of the 1989 Act a workers' compensation carrier is entitled to subrogation of a third party claim. Article 8308-4.05(f) specifically provides:

> If at the conclusion of a third party action, a workers' compensation claimant is entitled to compensation, the net amount recovered by the claimant from the third

> party action shall be applied to reimburse the insurance carrier for past benefits and medical expenses paid. Any amount in excess of past benefits and medical expenses shall be treated as an advance against future benefit payments of compensation that the claimant is entitled to receive under this Act. If the advance is adequate to cover all future compensation and medical benefit payments as provided by this Act, the insurance carrier is not required to make further payments. If the advance is insufficient, the insurance carrier shall resume the payments when the advance is exhausted. The reasonable and necessary medical expenses incurred by the claimant because of the injury shall be deducted from the advance in the same manner as benefit payments.

This language essentially tracts that of prior law. TEX. REV. CIV. STAT. ANN. art. 8307 Sec. 6a(c) (repealed).

It has been recognized under prior law that a carrier may compromise or waive its right to subrogation. Foster v. Langston, 170 S.W.2d 250, 251 (Tex. Civ. App.-San Antonio 1943, no writ); Otis Elevator Co. v. Allen, 185 S.W.2d 117, 120 (Tex. Civ. App.-Fort Worth 1944), *aff'd in part, rev'd in part*, 143 Tex. 607, 187 S.W.2d 657 (1945); Simon v. Chevron U.S.A., INC., 795 S.W.2d 340, 342 (Tex. App.-Beaumont 1990), *rev'd on other grounds*, 813 S.W.2d 491 (Tex. 1991). In the present case, the hearing officer concluded as a matter of law that the carrier did not waive its right to subrogation because a waiver is a voluntary intentional relinquishment of a known right and in the present case the carrier did not intend to relinquish its right to subrogation.

We agree generally that waiver requires intent, but we also recognize the applicability of a related legal doctrine to the present facts, the doctrine of estoppel. Although the terms waiver and estoppel have frequently been used by courts in the same sense, they have decidedly differently meanings. The Praetorians v. Stickland, 66 S.W.2d 686, 688 (Tex. Comm'n App. 1933) (hereinafter Praetorians). A waiver is the intentional relinquishment of a known right or such conduct as warrants an inference of the relinquishment of such right. Praetorians at 689. Estoppel precludes one who by his language or conduct leads another to do what he would not otherwise have done from subjecting the other to loss or injury by disappointing the expectations on which the latter acted. 34 TEX. JUR. 3d *Estoppel* § 1 (1984) and cases cited therein. Intent is a necessary element of waiver, but not of estoppel. Ferrantello v. Paymaster Feed Mills, 336 S.W.2d 644, 647 (Tex. Civ. App.-Dallas 1960, writ ref'd n.r.e.). Waiver is the voluntary surrender of a right; estoppel is the inhibition to assert it from the mischief that has followed one's own fault. Praetorians at 689.

The doctrine of estoppel has long been applied to the workers' compensation law by Texas courts. The Beaumont Court of Civil Appeals held that a carrier was estopped from asserting that a claimant was not an employee of its insured when the employer led the

claimant to believe he was covered by the carrier, and the carrier, had it exercised reasonable diligence, could have determined the true facts, but failed to do so. Southern Underwriters v, Jones, 125 S.W.2d 393 (Tex. Civ. App.-Beaumont 1939, writ dism'd judgm't cor.). Similarly, it has been held that a carrier was estopped from using the defense of election of remedies when a claimant had filed suit against a third party rather than electing to pursue his workers' compensation claim because the employer told him it did not carry workers' compensation insurance. Loveless v. Texas Employers Ins. Ass'n, 269 S.W.2d 454 (Tex. Civ. App.-Austin 1954, writ ref'd). In fact, it has been held that when a workers' compensation carrier relinquishes a part of its subrogation interest in a third party claim, it is estopped from claiming the subrogation interest it has relinquished. Otis Elevator Co. v. Allen, 185 S.W.2d 117, 121 (Tex. Civ. App.-Fort Worth 1944), *aff'd in part, rev'd in part*, 143 Tex. 607, 187 S.W.2d 657 (1945).

The record in the present case does not reflect that the hearing officer considered the doctrine of estoppel in deciding that the carrier was entitled to subrogation in the claimant's third party claim. The testimony of both the claimant and Ms. T show that the claimant had requested the carrier to voluntarily reduce its subrogation interest. The claimant testified that while awaiting a response to this request, he was told by the third party carrier that the carrier had waived any subrogation interest in the third party claim. It is clear that the carrier informed the third party carrier on January 5, 1993, that it was not pursuing its subrogation interest in the third party claim. The claimant testified that it was on January 5, 1993, that he was informed by the third party carrier that the carrier had relinquished its subrogation claim, and on that day he signed a release of his third party claim and was given a settlement check made payable to him solely. By executing the release the claimant gave up his legal right to pursue the third party claim any further. Also according to the testimony of the claimant his settlement of the third party claim ended the willingness of the carrier to negotiate further in regard to its subrogation interest.

The present case requires the carrier be estopped from now asserting its subrogation claim to prevent it from benefiting from its own mistake while making the claimant suffer for it. The circumstances of claimant's signing of the release of his third party claim shows the claimant relied upon the representation that the carrier was waiving his third party claim in signing the release. We reverse the decision and render a new decision that the carrier is estopped from exercising its subrogation claim and the claimant is entitled to benefits under the 1989 Act without any offset from the settlement of his third party claim.

The carrier is ordered to pay medical and income benefits in accordance with this decision and the 1989 Act. Income benefits accrued but not paid are to be paid with interest in a lump sum.

Gary L. Kilgore
Appeals Judge

CONCURRING OPINION:

I concur in the result reached herein. The carrier in this case clearly accepted liability, began paying benefits and even conducted negotiations, according to claimant, regarding compromise of its subrogation claim considering the severity of claimant's injuries. At the same time claimant's negotiations on his third party claim were somewhat restricted by the third party carrier's $20,000 policy limit. Mr. W, the third party carrier's adjustor, contacted carrier's adjustor, Ms. S, about any workers' compensation subrogation. Apparently Ms. S either didn't know about the coverage or used the wrong file number or in some other way carrier made a mistake in informing the third party carrier's adjustor that no workers' compensation had been paid and that carrier was waiving its subrogation. Mr. W, not being satisfied with this verbal assurance, wrote Ms. S asking for verification and faxed a copy to Ms. S. Ms. S apparently signed the acknowledgement and faxed back a signed copy of the letter verifying no workers' compensation had been paid and stating they, carrier, "will have no subrogation claim." Mr. W then informed claimant that he, Mr. W, had a waiver signed by carrier waiving its subrogation interest in the third party claim. Based on the representation that there was no subrogation, claimant executed a release settling the claim with the third party.

Perhaps the third party carrier was negligent in not checking its files to verify carrier had not made a subrogation claim, perhaps the carrier was in error by referring to the wrong file number or that carrier's adjustor, Ms. S, was negligent in signing a letter either without knowing or understanding what it said, however, what is clear is that claimant in no way encouraged or contributed to multiple errors by both carriers. The hearing officer found that carrier "did not intend to relinquish its right to recover from Claimant" its subrogation right. This disregards that carrier was negligent in mistakenly making representations that it "will have no subrogation claim" and thereby causing claimant to relinquish his third party claim against the third party and third party carrier.

Although Article 8308-4.05 would appear to address the issue of subrogation and clearly states the net amount recovered by claimant shall reimburse the carrier for past benefits and medical expenses and any excess shall be treated as an advance against future benefit payments. However, this disregards the claimant's contention that he was misled by the third party carrier, Mr. W, based on carrier's assurances that carrier was waiving its subrogation rights. As the main opinion points out, carrier and claimant had been negotiating a compromise of carrier's subrogation claim. Clearly carrier can waive or relinquish its subrogation rights. *See* Foster v. Langston, *supra*, *et. al*, cited in the principal

opinion. Carrier argues, and the hearing officer found, that carrier had not waived its right to subrogation because the waiver was based on a mistake of law and fact (acknowledging carrier was waiving its subrogation right) and therefore was not "a voluntary intentional relinquishment of a known right."

There has been comment that since the third party carrier's policy limit was $20,000, that claimant somehow benefitted by taking "an immediate and certain sum" rather than go through "the expense and time of litigation." I would point out that claimant did not benefit in any way in getting the "immediate and certain sum" because he will, under the hearing officer's decision, forfeit future benefits in the amount of $20,000, and in the meantime has released any and all claims, including a claim for pain and suffering against the third party. Although the third party at present may not have any additional assets, they may in the future have assets and the claimant would be forever precluded from asserting any claim against that third party.

It would seem that carrier could seek relief from the third party carrier in that the third party carrier had notice in the form of correspondence, a Notice of Lien and Subrogation Interest and medical bills, of carrier's subrogation rights. Any negligence or error was entirely on the part of carrier and the third party carrier. Before seeking reimbursement (in the form of treating the settlement as an advance) from claimant, carrier should seek recompense from the third party carrier for failing to comply with the notice of subrogation interest. The third party carrier was at least partially responsible for any error by failing to review its file regarding carrier's subrogation rights. I do not believe claimant, who was not at fault, should be penalized, by giving up his claim against the third party, for the errors committed by carrier and third party carrier. I believe carrier should continue to pay workers' compensation benefits and may seek recompense from the third party carrier in court. In the alternative a court may address the issue of whether carrier is entitled to treat claimant's settlement as an advance under Section 4.05, or whether there was a waiver or estoppel based on carrier's "acknowledgement" that it "will

have no subrogation claim." The issue, it appears to me, is one of equity, whether multiple errors on the part of carrier and third party carrier should work to claimant's detriment.

Thomas A. Knapp
Appeals Judge

DISSENTING OPINION:

I respectfully dissent, and would affirm the determination of the hearing officer for numerous reasons.

It is important to be clear about the issue involved. The carrier is not denying liability for the claim. What the carrier has done is stand upon the rights expressly set forth in Article 8308-4.05, which enable it to recoup past and future benefits for which it is liable, from the proceeds of any judgment or settlement with a third party whose actions contributed to the injury.

First, by the standard of review that we have applied, the decision of the hearing officer that there is no waiver is not against the great weight and preponderance of evidence in this case. His decision is sufficiently supported by the evidence. Indeed, the only missing facts are those supportive of the majority's estoppel theory (a theory not argued by the claimant, who has asserted at the CCH and on appeal only that the carrier had expressly waived its subrogation rights).

Second, the 1989 Act expressly addresses the situation here, setting out the course of action for the carrier to take when a damage settlement is paid by the third party. Article 8308-4.05(f) states that the net amount recovered by the claimant from the third party action shall be applied to reimburse the carrier for past income and medical benefits. Plainly, the statute contemplates situations in which the damages are paid to the employee rather than the carrier, without this amounting to a surrender of subrogation. The statute further makes it crystal clear that the excess after reimbursement for past benefits is treated as an advance of compensation against the future benefits. The carrier, not having received any reimbursement from the claimant for past benefits paid, has treated the full amount that was paid to the claimant as an advance, as the statute allows. The claimant, for his part, has received a sizeable advance of benefits that he otherwise would wait several months to be paid.

Neither the main opinion nor the concurring opinion deal directly with this statute, instead relying upon a theory of estoppel. The main opinion notes that it is "well settled" that an insurer may compromise or waive its subrogation rights. Cited as authority for this proposition are cases in which the insurer and the beneficiary expressly, and with facts amounting to a contract, amended the insurer's subrogation rights. I have found no authority for the proposition that the insurer's right of subrogation, described as a "property right" (Foster v. Langston, 170 S.W.2d 250 (Tex. Civ. App.-San Antonio 1943, no writ)) may be deemed waived in circumstances such as this. I do find authority indicating that where the right to subrogation has been considered by the court as curtailed through a carrier's acts or omissions, it is when the carrier has acted, or failed to act, "knowingly." *See* Evans v. Venglar, 429 S.W.2d 673, 675 (Tex. Civ. App.-Corpus Christi 1968, no writ). That is exactly the standard applied by the hearing officer in this case.

I don't agree that estoppel applies. Claimant did not rely on the letters written by and to third party carrier, or on any statements made directly by the carrier to him. There is no evidence that third party carrier had any authority to bind the carrier. Further, carrier told claimant it was asserting its subrogation rights, and had been involved in December 1992 discussions with claimant about splitting the third party recovery. A resolution of these discussions was pending at the time claimant talked with the third party carrier. It appears that claimant had reason to question, not rely on, what he was told by the third party carrier adjuster with regard to the carrier's purported "waiver." (The letter itself, based upon an erroneous claim number and wrong on its face when applied to the injury at hand, would not support a finding of estoppel). Finally, the record is silent as to whether third party carrier's representation actually caused claimant to do something he otherwise would not have done. The main opinion's assertion that claimant was led by the waiver into giving up his legal right to sue is no more than speculation. It appears that third party carrier paid the maximum that was due under the policy. Claimant had been informed by his own auto insurer that prospects for collecting damages from the third party were bleak. One could conclude, as claimant apparently did by accepting the settlement check, that an immediate and certain sum was better than the expense and time of litigation with no guarantee of collection of any amounts which might be in excess of those provided by insurance.

Regardless of what one may argue about the adequacy of the workers' compensation income benefits as a fair repayment for pain or impairment, the legislature has determined that certain third party damages must be used to offset the amounts paid out by the carrier. Whether or not this statute operates to "penalize" an injured employee is a matter to be addressed by the legislature. The only amounts that a claimant is allowed under Article 8308-4.05 to keep are amounts in excess of the compensation paid (or likely to be paid) by the workers' compensation insurance carrier. The main opinion fails, in my opinion, to make a persuasive legal, or evidentiary, justification for setting this statute aside. Bearing great respect for my colleagues who are on the other side of this decision, I nevertheless strongly disagree.

Susan M. Kelley
Appeals Judge